Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 964

LAWRENCE CAPITOL INC., *Petitioner*,

v.

STANLEY-WARNER CORPORATION
WARNER BROS. THEATRES, INC.
WARNER BROS. CIRCUIT MANAGEMENT CORPORATION
STANLEY-WARNER CIRCUIT MANAGEMENT CORPORATION
WARNER BROS. PICTURES, INC.
WARNER BROS. PICTURES DISTRIBUTING CORPORATION
TWENTIETH CENTURY-FOX FILM CORPORATION
TCF FILM CORPORATION
LOEW'S INCORPORATED
PARAMOUNT FILM DISTRIBUTING CORPORATION
PARAMOUNT PICTURES CORPORATION
RKO PICTURES, INC.
COLUMBIA PICTURES CORPORATION
UNIVERSAL FILM EXCHANGES, INC.
UNITED ARTISTS CORPORATION
REPUBLIC PICTURES CORPORATION
MASSACHUSETTS AMUSEMENT CORPORATION
EMPIRE AMUSEMENT CO., INC.
BROADWAY THEATRE CO., INC.
ESSEX SAVINGS BANK OF LAWRENCE
ROLAND SISKIND
HAROLD SISKIND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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March 1963

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Lawrence Capitol, Inc., prays that a writ of certiorari issue to review the judgment entered in this case on January 3, 1963, by the United States Court of Appeals for the First Circuit.

OPINION BELOW

No oral or written opinion was announced by the court of appeals.

JURISDICTION OF THE SUPREME COURT

The date and time of entry of the judgment to be reviewed was January 3, 1963.

The statutory provisions believed to confer on the Supreme Court jurisdiction to review the judgment, are Title 28, U. S. C., section 1254(1), and section 2101.

QUESTIONS PRESENTED FOR REVIEW

1. Is it within the discretion of the court of appeals to dismiss a timely appeal from an adverse judgment on the merits in a private suit under the antitrust laws, without a hearing and decision on the merits?

2. Under a rule requiring an appellant to furnish within ten days after filing the record, a statement of the parts which it deems "essential" for the judges to read and to print such parts in an appendix to its brief—is it within the discretion of the court of appeals to so dismiss such an appeal, because of the failure to furnish, within the ten days, a statement of excerpts from the record which appellant puts in an appendix to its brief but does not deem "essential" for the judges to read, which are not in fact essential for reading, are placed in the appendix merely for convenience, and where no detriment results to appellees and the court?

3. Does such dismissal constitute due process of law?

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS

Constitution of the United States:

> No person shall . . . be deprived of life, liberty, or property without due process of law; . . . (Amendments, Article V, U. S. Code Vol. One, page xlvi, 1958 edition.

Rules of the United States Court of Appeals for the First Circuit:

> Rule 24(1) Record Appendices to Briefs. The appellant or petitioner shall print as an appendix to his brief (which appendix may be bound separately) the relevant docket entries below arranged chronologically in a single column, any relevant charge or opinion of the court, agency, board, commission or officer below, the judgment, decree, order, or decision appealed from or sought to be reviewed or enforced, and such other parts of the record, material to the questions presented, as the appellant or petitioner deems it essential for the judges of the court to read in order to decide those questions.
>
> . . . . . .
>
> (2) Requirements of Appellant or Petitioner. The appellant or petitioner, within ten days after filing the record on appeal or review in the clerk's office, shall furnish appellee or respondent, and the clerk of this court, with a statement of the parts of the record he proposes to print in the appendix to his brief pursuant to this rule. At the same time he shall likewise furnish a statement of points upon which he intends to rely (like the statement of questions involved in (3)(b) of this rule), if the same is not already set forth in the record on appeal or review.
>
> . . . . . .
>
> (8) Filing. Within thirty days after the record on appeal or review is filed with the clerk of this court the appellant or petitioner shall file twenty-five copies of his printed brief and appendix thereto with proof of service of three copies upon counsel for each adverse interest.

STATEMENT OF THE CASE

On July 6, 1962, petitioner filed notices of appeal to the United States Court of Appeals for the First Circuit from judgments of the United States District Court for the District of Massachusetts, dismissing two treble damage antitrust actions of petitioner against respondents, which had been consolidated and tried together before a jury. The judgments were based on verdicts directed by the trial court at the close of petitioner's evidence.

The complaints charged respondents with engaging in a conspiracy to restrain and monopolize trade in motion pictures, especially for exhibition on first run in theatres at Lawrence, Mass. Petitioner operated one, and respondents three first run theatres at Lawrence. Petitioner was compelled to close its theatre and business in December 1954, because of inability to obtain pictures, which it charged resulted from the conspiracy of respondents. The case is a classical instance of the statement in *United States* v. *Paramount*, 334 U.S. 131, 162, "It is largely out of the ruins of the small operators that the large empires of exhibitors have been built."

The case in the court of appeals presented new, unusual and important questions of trial procedure, monopoly fact and antitrust law in suits by private parties. This petition does not, however, seek to have this Court review any of these questions, because the court of appeals has not heard or decided them. Petitioner asks this Court to review the action of that court in dismissing the appeals on a procedural formality relative to the filing of petitioner's brief.

The record was filed in the court of appeals on October 15, 1962.

The rules of the court required that an appellant should print as an appendix to its brief: (1) docket entires below; (2) any relevant charge or opinion of the court below; (3) the judgment; and (4) such other parts of the record as appellant deems essential for the judges to read. The rules provide that within ten days after filing the record, appellant should furnish to the clerk and appellees statements of the parts of the record which it proposed to print in the appendix, and of the points on which it intended to rely.

Petitioner filed with the clerk and served on respondents the statement of the points of reliance. It has never filed or served any statement of any parts of the record which it considered "essential" for the judges to read, because it has not deemed any part of the record so "essential".

The rules of the court also provided for filing appellant's brief within thirty days after filing the record. On October 25, 1962, the time for filing petitioner's brief was extended to December 31, 1962. (R. 3) On December 26, 1962, petitioner moved for another extension until January 31, 1963, because of inability to meet the December 31 deadline. (R. 7) Respondents made no opposition to this, but requested that the extension be granted on condition that petitioner furnish before January 7, 1963, a statement of the parts of the record to be printed, and that respondents be allowed until March 22, 1963, for filing their briefs.

On January 3, 1963, the court entered an order dismissing the appeals for "want of diligent prosecution." (R. 10)

Petitioner moved for reconsideration, to vacate the order and to reinstate the appeals, and to receive a brief and appendix which it attached to the motion. (R. 11) The motion was supported by affidavits explaining the delay and need for time.

Respondents filed oppositions to this motion, copies of which were received by petitioner on January 23, 1963. (R. 20, 27) Petitioner prepared a reply to the oppositions and at 9:20 a.m. on January 24 its president called the clerk on the telephone from Lawrence, and informed him that petitioner desired to file the reply, and would bring it to Boston on the following day for that purpose. On the same day, however, the order denying petitioner's motion for reconsideration etc. was issued. (R. 31) The court also at the same time directed that its mandate to the District Court on the order of dismissal of the appeals be issued forthwith. The mandate was accordingly issued on the same day. (R. 31)

Petitioner's reply and motion were served on respondents and tendered at the office of the clerk on January 25, 1963, but were refused. Petitioner then lodged the reply and motion with the court by mailing them to the clerk on January 25, 1963. Petitioner also moved the court for

recall of the mandate, but the motion was denied on February 7, 1963. (R. 32, 33) Thus petitioner's effort to resuscitate the appeals ended in failure.

The elapsed time from the filing of the record to the time of dismissal was 80 days, or on the third day after expiration of the extension allowed to petitioner.

Petitioner's necessity and reason for the second extension of time made in the motion of December 26, 1963, were succinctly stated as follows in an affidavit supporting its motion (R. 13):

> Russell Hardy, sr., being sworn, states as follows:
>
> I have prepared the brief for the appellant in these two cases on appeal. Because of the total lack of money, Lawrence Capitol Inc., as yet, has been unable to pay for my services. For the same reason it has been unable to furnish any money to obtain assistance in the preparation of the brief for me, and I have been compelled to prepare the brief in every respect virtually singlehandedly. Lack of money and great difficulty in obtaining credit has also greatly delayed Lawrence Capitol Inc. in procuring the necessary materials for prosecuting the appeals, as the transcript of trial, exhibits, etc. This poverty, which was copiously proved on cross-examination of appellant's chief witness (Tr. 1067-1139), is the result of the conduct of the appellees of which complaint is made in this case.
>
> The appeal was taken on July 6, 1962, but, because of lack of money, it was not until October that the appellant was able to procure and furnish the transcript of the trial, the numerous exhibits, and the record of other proceedings, for my use in preparation of the brief.
>
> The transcript of the trial and other proceedings is more than 1,500 pages, and the number of exhibits is more than 190. A number of the exhibits are long and complicated legal documents, requiring careful study and analysis for clear presentation in the brief.
>
> After receiving this material, it was first necessary for me to carefully read, study and make a written

digest and index of all of it. Otherwise the task of producing the brief would have been very difficult and greatly wasteful of time. On this part of the work I spent approximately 80 percent of my time until completion of the digest and index; although I was at the task on every day, including all of the Saturdays, Sundays and holidays, until well into November 1962.

Thereafter until completion of the brief proper, in final typewritten form, on January 11 at 9 p.m., the work occupied more than 90 percent of my time, including, as before, Saturdays, Sundays, Christmas Eve, Christmas Day, New Year's Eve and New Years Day.

As the brief discloses, the case involves unusually complex and unusually important economic and legal questions, on which even under more favorable conditions few if any attorneys could have produced an adequate brief in less time than I have used.

The financial disability of petitioner was more specifically stated in an affidavit of its president, also supporting the motion. (R. 15)

JURISDICTION OF THE COURT OF APPEALS

The court of appeals has jurisdiction of appeals from the judgments of the District Court under Title 28, section 1291, United States Code Judiciary and Judicial Procedure.

ARGUMENT

The Dismissal of the Appeals Deprived Petitioner of Due Process of Law

Petitioner has been deprived of its right to a hearing and determination of its appeals for a default which did not actually exist. If, however, petitioner was actually at fault, the severe punishment of dismissal of the appeals was out of all proportion to the delinquency taken as its fullest possible measure. For the fault of petitioner, if any, the punishment imposed has been the death sentence of its appeals.

The purpose of the ten day requirement would seem to be entirely for the benefit of appellees, to afford them at the earliest stage of the appeal information of the parts of the record on which appellant will most heavily rely, to aid appellees in the preparation of their briefs. As the rules require that the appendix also contain the docket entries, the opinion and judgment, any statement from an appellant informing them that these items would appear in an appendix, would merely inform appellees of what they already know.

Although petitioner added an appendix to its brief, containing three excerpts from the record, covering about five pages, it did not do so because the material was considered "essential" for the judges to read. The first excerpt was a statement by the trial judge of a rule of law, and the second a statement to the jury of his reasons for directing the verdicts. As the reasons given by a trial judge for his action and rulings, right or wrong, are not controlling on appeal, it was not essential that they should be read by the judges. The third excerpt was a small part of an exhibit which had been excluded from evidence, the findings of fact in the *Paramount Case*, 331 U.S. 131. Reference to the text of the brief will show that the same subjects were correctly and sufficiently described therein, and that the excerpts would merely serve the *convenience* of any judge who might desire more specific information.

While the facts shown in the excerpts are important and illustrative, they relate to no disputed question, and nothing turns upon any peculiar language in any of them. Nowhere in petitioner's brief were the judges referred to the excerpts as essential for reading or otherwise.

The rule does not bar an appellant from printing in an appendix to his brief, any part of the record which he *does not* deem essential for reading, nor require him to furnish a statement thereof within ten days or at any time prior to filing his brief.

Assuming, however, that the excerpts were "essential" for reading, any possible detriment to respondents or the court by delay or lack of diligence, was prevented or cured when the brief with the excerpts was tendered to the court and served on respondents on January 26, 1963.

Although in their oppositions respondents complained generally and copiously of petitioner, the only specific charge made of any "want of diligent prosecution" was the failure to designate "essential" reading. They made no claim whatever that any detriment had been or would be suffered by them or the court from the failure.

Respondents admitted in these oppositions that petitioner's lack of money was the cause of the delay. They stated: "these appellees accept as true the statement that the appellant has been handicapped by lack of funds in the prosecution of its appeal and in printing their brief and record appendix. They assert that fact (which is the only basic fact set forth in the affidavit in support of the present motion) is completely irrelevant to the Court's consideration of the instant motion."

In *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, this Court said:

> The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is involved. If that is preserved, the demands of due process are fulfilled. (p. 246)

The appeals were dismissed on the ground of want of diligence, without any hearing on the question of diligence. On December 26, 1962, petitioner moved for an extension of time; to which respondents made no objection which could not be met by petitioner. Nevertheless, on January 3, 1963, the court entered an order denying the extension.

Although no motion or charge of lack of diligence was before it, the court went further and dismissed the appeals

for want of diligence. The only hearing, if any, on diligence came after the dismissal, and consisted of the receipt by the court of a motion for reconsideration filed by petitioner, to which respondents filed oppositions. To these oppositions, however, the court refused to permit petitioner to reply or to cure the alleged want of diligence. The motion for reconsideration was denied.

In *Morgan* v. *United States*, 304 U.S. 1, 18, this Court said:

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one.

The peremptory dismissal of petitioner's appeals is an example of the hostility to private antitrust suits referred to by Circuit Judge Clark in *Eagle-Lion Studios* v. *Loew's*, 248 F. 2d 438, 449, 450, 451, as vitiating the efficacy of private suits, which this Court has recognized as a potent supplementary means of enforcement.

Bruce's Juices v. *American Can Co.*, 330 U.S. 743, 751

United States v. *Borden*, 347 U.S. 514, 518.

The certified copy of the record filed with this petition, is incomplete. It does not contain the following described documents, which the clerk of the court of appeals has declined to furnish, and which petitioner has therefore moved that court to require the clerk to furnish for filing in support of this petition. The motion is pending.

The brief attached to petitioner's motion, filed in the court of appeals on January 17, 1963.

Motion by petitioner for leave to file memorandum in reply to two memorandums submitted by various appellees, dated January 23, 1963.

Memorandum of petitioner in reply (1) to memorandum by appellee Essex Bank and (2) to memorandum of appellees represented by Nutter, McClennen & Fish, dated January 23, 1963.

Letter dated January 26, 1963, to Roger A. Stinchfield, Clerk, signed Jean C. Campopiano.

Copy of letter dated January 31, 1963, to Jean C. Campopiano signed by Dana H. Gallup, Chief Deputy Clerk.

CONCLUSION

It is respectfully submitted that the action of the court of appeals calls for an exercise of this Court's power of supervision, and that for the reasons stated this petition should be granted.

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March 1963